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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957
No. 59

NORTHERN PACIFIC RAILWAY COMPANY and
NORTHWESTERN IMPROVEMENT COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the United States District Court for the Western District of Washington, Northern Division (R. 184), is reported at 142 Fed. Supp. 679. Transcript of the court's oral decision denying appellant's motion for reconsideration is at R. 210.

JURISDICTION

This suit was brought on May 26, 1949, under Section 4 of the Act of Congress of July 2, 1890 (26 Stat. 209, Title 15 U.S.C., Sec. 4), as amended, commonly known as the Sherman Act, to prevent and restrain alleged violations by appellants of Sections 1 and 2 of said Act. The judgment of the District Court was entered on August 31, 1956 (R. 194) and the notice of appeal was filed in that court on October 23, 1956 (R. 215-218). This court noted probable jurisdiction of the appeal on January 21, 1957 (R. 219). The jurisdiction of this court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29) as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. The following decisions sustain the jurisdiction to review the Partial Final Judgment: *Associated Press* v. *United States*, 326 U.S. 1; *International Salt Co.*, v. *United States*, 332 U.S. 392; *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427; *Cold Metal Process Co.* v. *United Engineering Co.*, 351 U.S. 445.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether agreements which a railroad company and its subsidiary land company customarily include in contracts for the sale of their timber lands or timber and in leases of their lands, that the purchaser or lessee will ship over the lines of the railroad company, where the destination can be reached via its lines, all traffic incident to his use of the land, provided its rates and service are equal to those of any competing line, are (except in the case of industrial leases) *per se* unreasonable restraints of commerce in trans-

portation in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C., §1) where, in consequence of Government land grants in aid of construction of the railroad, the companies own lands and reserved mineral rights aggregating several million acres scattered through six states and the actual or potential interstate commerce in transportation of commodities from the properties subject to such agreements is substantial but there is no evidence that the companies have any monopoly of any type of lands or timber or other natural resources in any area or that they have any monopoly power or dominance over any market for lands or timber or other natural resources of any kind.

2. Whether in such a case issues of fact raised by the pleadings as to the economic consequences of said agreements, their effects upon purchasers and lessees, their effects upon competition, and their reasonableness under all the circumstances, constitute material issues of fact for trial.

STATUTES INVOLVED

The pertinent provisions of Section 1 of the Act of July 2, 1890, 26 Stat. 209 (15 U.S.C. 1, 2), commonly known as the Sherman Act, are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *."

STATEMENT

Nature of the Case and Proceedings Below

This is a civil suit instituted by the United States on May 26, 1949, under Section 4 of the Sherman Act, to enjoin alleged violations of Sections 1 and 2 of that Act. The complaint (R. 1-12) alleged that appellant Northern Pacific Railway Company, a land aided common carrier railroad corporation, and its wholly owned subsidiary, Northwestern Improvement Company, a Delaware corporation, which had acquired certain lands of the Railway Company, had been and were engaged in the making of contracts and in a conspiracy to make contracts to restrain unreasonably, and had conspired and combined to monopolize and had attempted to monopolize, the interstate trade and commerce involved in the business of transporting commodities and products shipped from and in transporting commodities and products shipped to persons and concerns occupying lands sold or leased to them by appellants, by requiring grantees of rights in or to the use of such lands to agree to ship or have shipped over the lines of Northern Pacific any and all products of whatever nature coming from the land and by threatening to refuse and refusing to grant rights in or to the use of their lands to grantees who refused to comply with such shipping requirements. In brief, it was alleged that the exaction of such shipping requirements had secured to Northern Pacific a substantial monopoly of the transportation of the products and commodities coming from and produced on lands of appellants and other lands, had deprived grantees of rights and interests in such lands of a free choice as to both the means of transportation to be used and of markets in which to sell commodities and pro-

ducts coming from such lands, had deprived potential buyers of products and commodities produced on such lands, who buy and sell in markets not served by lines of the Northern Pacific, of the right to purchase such products and commodities in a free market, and had deprived competing railroads and competing motor truck and steamship lines of an opportunity to compete in an open market for the business of transporting products and commodities coming from said lands.

Appellants in their answer admitted that they customarily included shipping agreements of various types in most of their leases of lands and contracts for the sale of timber, and in some instances in connection with the sale of timber lands, but alleged that in substantially all cases such shipping agreements (hereinafter called "traffic clauses") had been subject to provisos which fully preserved the rights of grantees and lessees to use the services of other transportation agencies whenever their rates or services were more favorable than those of Northern Pacific, and they denied that they had done any of the other things alleged in the complaint or that any conduct on their part prevented or unreasonably restrained competition or had or could have any of the harmful effects alleged (R. 12-22).

On July 31, 1953, appellee moved for summary judgment in favor of the United States on the ground that no issue as to a material fact was presented and that on the undisputed facts it was entitled to judgment as a matter of law (R. 144). The contention of the Department of Justice was that appellants' dominance of their own lands as a tying commodity or device had been used to foreclose or restrict competition in transportation service to and from the land, the commerce in which was not inconsequential or insub-

stantial in amount, and that accordingly the traffic clauses constituted restraints of trade which were unreasonable *per se* and therefore violative of Section 1 of the Sherman Act under principles announced in the so-called "tying cases" (R. 186, 187). The motion was heard before Judge George H. Boldt on February 17, 1956, on a record consisting of the complaint and answer, appellants' response and supplemental response to appellee's request for admissions under Rule 36 of the Rules of Federal Procedure, stipulations of the parties, and the depositions of seventy-two witnesses, taken by appellants.

The court's opinion, holding all of the traffic clauses in question, excepting those in the industrial leases (including grain elevator and grain warehouse leases), to be violative of Section 1 of the Sherman Act under the principles enunciated by this Court in the "tying" cases, was filed June 25, 1956 (R. 184). Findings of Fact and Conclusions of Law were made by the court and filed August 31, 1956 (R. 199), and Partial Final Judgment was entered on the same day (R. 194). Following the filing of Judge Boldt's opinion, appellants, on August 8, 1956, filed their motion for reargument and reconsideration, on the ground that the decision of the court was contrary to and in conflict with the principles restated and clarified in *United States of America* v. *E. I. du Pont de Nemours & Company*, 351 U.S. 377, decided June 11, 1956 (R. 192). On August 31, 1956, the motion was orally argued before Judge Boldt and denied (R. 210-215). The court thereafter revised his decision of June 25, 1956, so as to include a statement of his views with respect to the inapplicability of the du Pont case (R. 190).

Appellants' Land Holdings

Under the grants made by Congress by the Act of July 2, 1864 (13 Stat. 365) and the Joint Resolution of May 31, 1870 (16 Stat. 378), appellant, Northern Pacific Railway Company, acquired approximately 39,400,000 acres of land located in the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon, the states through which its railroad was constructed and now operates. The grant (besides the grant of a 400-foot right of way) consisted of every alternate section of public land, not mineral, in the amount of twenty sections per mile through territories and ten sections per mile through states on each side of the railroad line as definitely located. There was also granted the right of selection of lieu lands in two belts lying, respectively, ten and twenty miles beyond the limits of the original grant to make good lands in place limits found to have been previously granted, sold or occupied by settlers, and, as indemnity for mineral lands, the right to select other lands suitable for agricultural purposes located within fifty miles of the railroad (Findings 3, 4, 5 and 6; R. 200-201). Since the grant was of alternate odd-numbered sections, both in place and indemnity limits, lands acquired or selected under the grants could be as far as sixty miles away from the railroad line where it passed through territories, and as far as forty miles away (or fifty miles in the case of mineral indemnity lands) where it passed through states.

Of the 39 odd million acres of land acquired under the land grant, there remained in appellants' ownership at the time the complaint was filed approximately 2,700,000 acres (not including right of way) and approximately 6,500,000 acres of reserved mineral rights in land previously sold to pur-

chasers (Finding 7; R. 201). The lands sold and those remaining in appellants' ownership are of many different types, some being used for grazing and agriculture, some containing timber, and some containing iron ore, coal, oil and gas, or other natural resources (Finding 8; R. 201). There was no evidence before the court as to the particular location of any of these lands or as to the availability to prospective purchasers or lessees of other similar lands in the same general areas, except that the legal descriptions of the lands in Montana and Washington subject to grazing leases held by witnesses whose depositions were taken were included in the record (R. 155-183), and except that approximately 8,000 acres of iron ore lands owned by appellants, of which only 160 acres were producing, were stated to be on the Cuyuna iron ore range in the vicinity of Brainerd, Minnesota (John Hughes deposition pp. 12, 13).

Appellants' ownership of standing timber in the states of Montana, Idaho and Washington in the period between 1935 and 1942, when a nationwide inventory of merchantable timber was made by the Forest Service, compared as follows with the total estimated volume of timber in these states in all ownerships:

	All Ownerships Vol. M. Bd. Ft.	Appellants' Ownership Vol. M. Bd. Ft.	Appellants' Percent of All Ownerships
States:			
Montana	43,929,590	2,627,002	5.98
Idaho	37,207,973	2,148,253	5.77
Washington	243,797,385	10,944,390	4.49
	324,934,948	15,719,645	4.84

(Affidavit of R. G. Lindgren; R. 149-151).

Appellants Use of Traffic Clauses

Appellants are and have been engaged in the sale of land and of standing timber, in the leasing of land with rights to remove timber, oil, gas, metals, clay, coal or other natural resources, and in the leasing of land for grazing purposes, pending the sale thereof. They also engage in the leasing of sites on or adjacent to the right of way for industrial purposes (Finding 9; R. 201). Their leases and some of their timber land and timber sale contracts customarily contain traffic clauses as hereinafter more particularly stated. Of the approximately 37 million acres of land which appellants had sold up to 1949, however, over 90 % were conveyed without obtaining any routing commitment (John Hughes deposition, p. 21). Between 1940 and 1951, the appellants sold 2,787,961 acres of grazing lands in the territory between Livingston, Montana, and Dickinson, North Dakota (Henry Berg deposition, p. 5). No routing clauses are included in conveyances of grazing lands (John Hughes deposition, p. 21). Appellants have always followed the policy of selling grazing land whenever they could find a purchaser, in preference to leasing it (Hughes deposition, p. 25).

A large portion of the shipments of products of lands affected by the traffic clauses has been and is made in interstate commerce (Finding 10; R. 201, 202). Means of transportation other than the lines of defendant Northern Pacific are available for the transportation of a substantial part of such commodities and products during all or a part of their interstate shipment, including the railroad lines of the Great Northern Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, numer-

ous motor freight lines and steamship lines (Finding 12; R. 202).

Over 1,000 grazing leases, covering more than 1,000,000 acres of land, were in effect in 1949, containing a traffic clause requiring all shipments of livestock, wool, mutton or beef destined for points on the lines of Northern Pacific or its connections, to be shipped Northern Pacific whenever its freight rates do not exceed the rates of other lines (Findings 13 and 14; R. 203).

Oil and gas leases, of which at least 19 covering 135,000 acres of land, were in effect in 1949, contain traffic clauses giving Northern Pacific the routing of all traffic destined for rail shipment, provided that its rates and service shall equal those of any competing line, and requiring delivery of all oil to a pipe line reaching the rails of Northern Pacific where such a pipe line is available and a price can be obtained for oil so delivered which is at least equal to the price then obtainable for oil delivered to any other pipe line (Findings 15, 16, 17, 18; R. 203, 204).

Leases of coal lands, of which at least twelve were in effect in 1949, generally contain a traffic clause providing for all shipments of coal and incoming freight to be via Northern Pacific, provided Northern Pacific's rates and service equal those of any competing line (Findings 19, 20; R. 204).

Iron ore leases, of which at least sixteen, covering 5,261 acres of land were in effect in 1949, contain a traffic clause giving Northern Pacific the routing of all ores and concentrates, provided that rates, service and facilities equal those of any competing line (Findings 21, 22; R. 205).

Mineral land leases, of which at least seventeen, covering 6,810 acres of land were in effect in 1949, contain a traffic

clause requiring shipment of the products via Northern Pacific, provided that its rates, and in some instances its service or facilities are equal to those of other lines (Findings 23, 24; R. 205).

Timber sale contracts, of which thirty-one, covering 100,585 acres and 1,491,895,995 board feet of timber, were in effect in 1949, generally (although not in all cases) contain a traffic clause providing in substance that, rates being equal, the purchaser, and in some instances its successors and assigns, shall ship over Northern Pacific lines all logs, poles, lumber and other products manufactured from the timber cut under the contract or an equivalent quantity of lumber and other products manufactured from timber cut from lands not covered by the contract (Findings 28 and 30; R. 207).

Traffic clauses in contracts relating to the sale of timber lands are conditional upon "rates being equal" (Finding 25; R. 206).

In Finding 27 (R. 206) the court stated that "out of seventy-five of defendants' contracts for the sale of timber land involving approximately 2,144,177 acres containing approximately 21,554,766,000 board feet of timber, at least seventy-three contracts covering 2,144,137 acres and containing 21,553,762,000 board feet of timber were subject to traffic clauses." This statement does not refer to contracts in effect in 1949, but refers to all sales of timber land made by appellants and their predecessor Northern Pacific Railroad Company, since 1887 (Exhibit A to Response To Request for Adminssions; R. 89, 90). Included in these sales is a sale made January 3, 1900, to Frederick Weyerhaeuser, covering 900,000 acres and 14,981,000,000 board feet (R. 90). The supplemental response to request for admissions shows

that this contract contained traffic clause Form 35 (R. 104), which limited the shipping obligation to a period of fifteen years from the date of the contract and therefore expired in 1915 (R. 133). There is nothing in the record to show how much, if any, of the standing timber covered by the timber land sales during the period from 1887 through 1949 remained uncut in 1949. In consequence it cannot be assumed that in 1949 any very large amount of timber land theretofore sold by appellants was affected by these traffic clauses.

No evidence whatever was before the court as to any harmful effects of appellants' traffic clauses upon competition, or as to any ill effects actually suffered by purchasers and lessees of appellants' lands or by others. On the contrary, the testimony of seventeen holders of grazing leases, whose depositions were taken by appellants, was that the routing clause in their leases had never caused them any trouble and never seemed to them unreasonable. For example, a witness who had been a member of the Montana Wool Growers Association since 1931, a trustee since 1938, and President in 1947 and 1948, testified that the Association holds meetings annually, attended by 400 to 800 of the members, at which grievances are aired, and that he had never heard of a complaint being submitted to the Association about the routing clauses (William Denecke deposition, pp. 15, 17).

Opinion of the Court Below

The District Court agreed with the contentions of the Department of Justice that "defendants' dominance of N.P. land as a tying commodity or device has been used to foreclose or restrict competition in the tied commodity, trans-

portation service to and from the land, the commerce in which is not 'inconsequential or insubstantial' in amount" (R. 187) and held that "On the established facts all of the traffic clauses in question excepting those in the industrial (including grain elevator and grain warehouse) leases, are shown to be violative of Section 1 of the Sherman Act under the principles enunciated in the tying cases" (R. 192). As to the industrial and grain elevator and grain warehouse leases he found that "such lands are an integral part of the property devoted to railway operations and are directly related to transportation, the asserted tied commodity", and he held that "whether under such circumstances the industrial leases involve distinct and separate tied and tying commodities, as held required and found lacking in *Times-Picayune* v. *United States*, *supra*, presents at least a question of fact which precludes summary judgment and will require trial as to all issues pertaining to the industrial leases" (R. 191, 192).

With respect to appellants contention that summary judgment was unauthorized because market domination of the tying device was not established, there being no evidence as to "the proportion of NP lands of various types to the total of the lands of the same types sold and leased in the area of defendants' operations" he held that "The tying commodity need only be the particular property or product to which forced purchase of the second commodity is tied" (R. 189). He said (R. 190):

> "The tying commodity in the present case is the land presently or formerly owned by NP. Unrestricted fee simple title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic

clauses in question on the grantees and lessees of the land".

In support of his view that absolute ownership of the particular property employed as the tying device was all that needed to be shown to render illegal *per se* under Section 1 of the Sherman Act a tying arrangement affecting a not insignificant or insubstantial amount of commerce in the tied commodity, he cited *International Salt Co.* v. *United States*, 332 U.S. 392, and the statement with respect thereto in *Standard Oil Co. of Calif. et al* v. *United States*, 337 U.S. 293, that in *International Salt* (which involved leases of patented machines requiring use therein of salt purchased from the lessor only): "It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition" (R. 190).

Judge Boldt was of opinion that the market dominance required as the first element of an illegal tying device is not synonymous with the monopoly power that is a requisite for violation of paragraph 2 of the Sherman Act (R. 190). He said that if it were held to be synonymous "there would never be any occasion for the doctrine of the tying cases because if you were considering an established monopoly you wouldn't have to be concerned about what the monopolist did with it" and that "The monopoly in and of itself would be unlawful, and whether used for tying purposes or otherwise would be of no concern" (R. 211). He said further: "If the facts show that you have absolute fee title over vast quantities of land, that shows the dominance right there" (R. 215).

In so ruling, we think the court misunderstood and misapplied the doctrine of the "tying" cases, which, as we understand them, make illegality of tying arrangements under Section 1 of the Sherman Act dependent not only upon the amount of commerce affected but upon the wielding of *monopolistic power* over purchasers or lessees of the tying device and therefore require proof of the existence of a monopoly of the relevant market for such device, irrespective of the lawfulness or unlawfulness of such monopoly.

SUMMARY OF THE ARGUMENT

Summary judgment was erroneously granted, for, in any view of the case, material issues of fact for trial were presented. *Per se* illegality of the traffic clauses under the doctrine of the "tying" cases depended upon proof that appellants held a position of dominance in the relevant land markets and that they used that dominance to *exclude* competitors from the market for transportation of the traffic generated on such lands. Neither proposition could properly be inferred from the admitted facts. And since the traffic clauses leave purchasers and lessees free to use the services of other transportation agencies, where rates are less or service better, they are non-exclusive in character and prima facie reasonable. Their alleged harmful effects upon competition and upon purchasers and lessees and others were clearly issues of fact for trial.

In holding that, under the rule of the "tying" cases, only market dominance of the particular property used as the tying device need be shown, and that "If the facts show that you have absolute fee simple title over vast quantities

of land, that shows the dominance right there" the court misunderstood and misapplied the rule. It is not the exercise of mere ownership powers to secure benefits in another line of commerce that the Sherman Act condemns. It is "the wielding of monopolistic leverage" in one market to restrict competition in another. See *United States* v. *Griffith*, 334 U.S. 100, 107; *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 611. If the rule were as applied by the court below, all distinction between Section 1 of the Sherman Act and Section 3 of the Clayton Act would be obliterated, for obviously no tying arrangement can exist without ownership and hence "market control" of "the particular property or product to which forced purchase of the second commodity is tied." Suppression of competition or other harmful economic consequences cannot be presumed to result from otherwise reasonable agreements with respect to commercial dealings merely because they are attached as conditions to the sale or lease of land, in the absence of any showing that purchasers or lessees are substantially restricted to the lands offered by the seller or lessor.

Whether the requisite leverage over purchasers or lessees is possessed by a seller or lessor is certainly a question of fact, where neither patent nor copyright furnishes the requisite power. Market dominance or monopolistic leverage must then be appraised in terms of the competitive market for the tying commodity or property and the relation of what the seller or lessor controls to the total supply available in that market. See *Standard Oil Co.* v. *United States*, 337 U.S. 293, 307; *Times-Picayune Pub Co.* v. *United States*, *supra*, p. 611; *United States* v. *du Pont & Co.* 351 U.S. 377, 392, 393, 404. The problem can be no different where the charge is illegal use of lawfully acquired monopoly power

than where it is illegal monopolization, as in the *du Pont case,* for the possession of monopoly power is requisite in either case.

The mere quantity of appellants' lands in the aggregate furnished no justification for the assumption that appellants possessed monopolistic leverage over users of land or transportation services. These lands are the remnants of a land grant consisting of alternate odd-numbered sections of land located in belts fifty to sixty miles wide on either side of the line of railroad in seven states and their character and the uses to which they are adapted vary with the country traversed by the railroad. Little is shown as to their particular location and nothing appears as to the supply or demand for lands of the same character in the respective areas in which they lie. Whether any of these lands are unique in character or in any case the only land that would satisfy the needs of the purchaser or lessee, as argued by the Department of Justice, certainly depends upon proof and cannot be assumed or inferred. Appellants' lands cannot be aggregated for the purpose of determining the strength of the leverage appellants may have over purchasers or lessees, for a monopoly of lands of one kind in one area could not affect the market for lands of a different kind in another area. For example, control of a majority of the iron ore bearing lands on the Cuyuna iron range in Minnesota, if appellants owned a majority thereof, could not conceivably enable them to secure any traffic in forest products from western states, or vice versa.

Freedom to use the services of competing lines where rates or services are more favorable makes appellants' traffic clauses non-exclusive and prima facie reasonable. They are essentially different in this respect from the "Lixator" pro-

vision held ineffectual to "avoid the stifling effect" on competition of the tying agreements considered in *International Salt Co. v. U.S.*, 332 U.S. 392, 397, for railroad rates must be published in filed tariffs on statutory notice, open to all shippers of the same commodity between the same points and reasonably related to rates from other points. Appellant Northern Pacific cannot make reduced rates for only the traffic of purchasers or lessees of its lands. If it wishes to meet the lower rate of a competing rail line or truck line or barge line in order to retain the traffic of a purchaser or lessee of its land, it must publish the rate for the benefit of all shippers of the same commodity between the same points. The traffic clauses accordingly allow full reign to competition in the matter of rates and they only control the shipper's choice between competing transportation agencies where it is a matter of indifference to him which he shall select. Their primary function is to take the place of solicitation of the traffic of those using appellants' lands to carry on their businesses.

It cannot be assumed that the provisos to which appellants' traffic clauses are subject are ineffectual to avoid the stifling effect of the traffic clauses on competition, for many of the affected lands are tributary to the lines of other railroads, making their services more favorable to the purchaser or lessee, and the services of appellant Northern Pacific may be less favorable for other reasons, or its rates may be higher.

The difficulties encountered by the railroads in meeting the rates and service of truck lines, water lines and pipe lines are matters of common knowledge. See the Report of the Presidential Advisory Committee on Transport Policy and Organization, April 1955, p. 1, and the 70th Annual Report of the Interstate Commerce Commission, pp. 1 and 2.

Preferential routing clauses, such as are here in issue, have been many times before the courts and have been uniformly upheld as reasonable and neither in restraint of trade nor otherwise unlawful. See, for example, *Stephenson v. St. Louis Southwestern Ry. Co. of Texas*, 181 S.W. 568; *Southwestern Lumber Co. of New Jersey v. Kerr*, 11 F. Supp. 253, aff'd 78 F(2d) 348; Cert. Den. 296 U.S. 611; *Cascade Timber Co. v. Northern Pacific Ry. Co.*, 28 Wash. (2d) 684, 184 P.(2d) 90; *Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co.*, 4 F.(2d) 359. Until harmful effects on competition or on users of transportation or others are factually established, appellants' traffic clauses cannot be held violative of Section 1 of the Sherman Act.

ARGUMENT

I

Summary Judgment Was Unauthorized

On reason and authority we think two propositions are sound and decisive of this appeal: (1) illegality of a tying arrangement under Section 1 of the Sherman Act, where neither patents nor copyrights supply the requisite market control, must be predicated upon a showing of possession and use of *coercive* power over users of the tied product resulting from control of the supply available in the market of something else required by such users in the conduct of their businesses; (2) in the absence of such coercive power, agreements obtained from shippers by a regulated transportation company, giving it priority over competitors in the transporta-

tion of the shippers' freight where rates and service are equal, are prima facie reasonable because they neither "foreclose competitors" from the market nor discourage competition based on merit, and they obviously do not tend to restrict production, raise prices or otherwise control the market for transportation to the detriment of the public. If these propositions are sound, summary judgment was erroneously granted in this case, for neither control by appellants of the supply of lands of any type upon any relevant market nor suppression of competition or other harmful economic consequences resulting from appellants' use of traffic clauses was factually established. We proceed, therefore, to a discussion of these points.

A. Illegality of a tying arrangement under Section 1 of the Sherman Act, where neither patents nor copyrights supply the requisite market control, must be predicated upon a showing of possession and use of coercive power over users of the tied product resulting from control of the supply available in the market of something else required by such users in the conduct of their businesses.

Only unreasonable restraints are prohibited by the Sherman Act. *United States* v. *Standard Oil Co.*, 221 U.S. 1. And, as said by this court in *Associated Press* v. *United States*, 326 U.S. 1, at page 26, whether a restraint is unreasonable "depends, in essence, on the significance of the restraint in relation to a particular industry." The forbidden restraints are those which limit "free competition in business and commercial transactions" and thereby tend "to restrict production, raise prices or otherwise control the market

to the detriment of the purchasers or consumers of goods and services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493. Contracts, combinations or conspiracies which directly restrict production, fix prices or otherwise control the market, to the detriment of purchasers or consumers, or which inevitably tend to do any of those things, are accordingly *per se* unreasonable restraints of trade or commerce and illegal. But tying arrangements are not necessarily of this character.

By Section 3 of the Clayton Act (Title 15, U.S.C.A. §14) Congress expressly outlawed exclusive dealing contracts and tying arrangements in connection with leases or sales of "goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented," where the effect of such contract or arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." But neither exclusive dealing contracts nor tying arrangements were thereby made *per se* illegal. Proof of the effect thereof on competition is still necessary for a finding of illegality, although such effect may be inferred from proof either of market control of the "tying" device or substantiality of the commerce affected. *Standard Oil Co. v. United States*, 337 U.S. 293, 299, 314.

The *per se* unreasonableness of conditioning the sale or lease of a *patented* machine upon a requirement that only articles controlled by the seller or lessor be used therein was announced by this Court in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502. The Court held that no right to control by restriction the materials used in operating a patented machine could be "derived from or protected by the patent law" (p. 513) and it said that to enforce the restriction "would be to create a monopoly in the manu-

facture and use of motion picture films." (p. 518) In all subsequent patent infringement cases of that type the Court has consistently held that "the owner of a patent may not employ it to secure a limited monopoly of an unpatented material used in applying the invention." The cases were collected in *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 664, 665, where the Court said: "In those cases both direct and contributory infringement suits were disallowed on a showing that the owner of the patent was using it 'as the effective means of restraining competition with its sale of an unpatented article'." Then in *International Salt Co.* v. *United States*, 332 U.S. 392, the Court held such a patent tying arrangement, affecting a substantial amount of commerce in the tied product, *per se* unlawful, not only under Section 3 of the Clayton Act, but also under Section 1 of the Sherman Act, because "Not only is price-fixing unreasonable, *per se*, * * * but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. * * * The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." (P. 396).

Necessity in Sherman Act cases that the wielding of monopolistic leverage be shown

Tying arrangements such as we have here, which are not within the purview of Section 3 of the Clayton Act, because they do not involve dealings in "goods, wares, merchandise, machinery, supplies, or other commodities," are illegal under the Sherman Act only if *both* "monopolistic position in the market for the 'tying' product" *and* restraint of "a sub-

stantial volume of commerce in the tied product" are established, because under that Act a restraint must be shown to be unreasonable and unreasonableness cannot logically be inferred from the amount of commerce affected unless suppression of competition tending to monopoly or other harmful economic consequences also appears. This was clearly stated by this Court in *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 609, as follow:

> "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the tied product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act, because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable *per se*, to foreclose competitors from any substantial market' a tying arrangement is banned by Section 1 of the Sherman Act whenever *both* conditions are met."

Obviously, competitors are not *necessarily* foreclosed from any substantial market by a tying arrangement obtained without economic coercion of the purchaser or lessee, merely because the amount of commerce affected is substantial; for the arrangement then may be merely the legitimate result of competition or of normal commercial dealings. Especially must this be so where, as here, the arrangement leaves the purchaser or lessee free to buy the goods or services of others, where it is to his advantage to do so. Unreasonableness of the restraint in such cases, if it be unreasonable, must be found in the use of *coercive* power over purchasers or users of the tied product or service to gain an unfair advantage over competitors. Such coercive power can only

exist when the seller or lessor has a monopolistic position in the market for the "tying" thing, i.e. control of all or a major portion of the supply of things of that kind available in the market to which the purchaser or lessee must resort in the transaction of his business.

The words "monopolist" and "monopolistic position" used by this Court were no chance expressions. In all of the tying cases and exclusive dealing cases in which neither patents nor copyrights supplied the requisite market control, this Court, in determining whether the seller or lessor had the necessary "dominance" of the "tying" thing, has applied the same tests as are requisite to determine the issue of unlawful monopolization and has clearly indicated that by "dominant position", "dominance of the market", "market control" and like expressions, it means "monopoly" in the sense in which that term is ordinarily understood.

Thus, in *United States Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, where the evidence showed that defendant controlled more than 95% of the business of supplying shoe machinery in the United States, the Court said, in holding certain restrictive provisions in leases of United's machines to be violative of Section 3 of the Clayton Act:

> "That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company, which may be absolutely essential to the prosecution and success of his business." (pp. 457, 458)

In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, where a combination of motion picture exhibitors and distributors operating theaters in Tennessee, Alabama and Kentucky was held violative of Section 1 of the Sherman Act, the Court said (p. 181):

> "The crux of the government's case was the use of the buying power of the combination for the purpose of eliminating competition with the exhibitors and acquiring a monopoly in the areas in question. There was ample evidence that the combination used its buying power for the purpose either of restricting the ability of its competitors to license films or of eliminating competition by acquiring the competitor's property or otherwise. For example, the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition."

In *United States* v. *Griffith*, 334 U.S. 100, where Griffith tied its theaters in closed towns where it had no competition to its theaters in towns where it had competition in order to obtain certain exclusive privileges from motion picture distributors, the Court held the practice violative of Section 1 of the Sherman Act, and said that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." (p. 107) That the Court meant monopoly in the ordinary sense is evident from the following quotation from the opinion in that case:

> "A man with a monopoly of theaters in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against

> his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. * * * When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire." (pp. 107-108)

The point is made even clearer by the cases in which the requisite market dominance was found lacking. In *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, where Standard's exclusive dealing contracts with independent dealers were held violative of Section 3 of the Clayton Act, because of the substantiality of the commerce affected, it appeared that Standard was the largest seller of gasoline in Arizona, California, Idaho, Nevada, Oregon, Utah and Washington but that between1936 and 1946 its share of the total taxable gallonage sold in these states remained practically constant and that in 1946 it sold only 23% of the total. After noting that all but one of the later cases in which it had passed on the applicability of Section 3 of the Clayton Act "regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened" (p. 301), the Court held that Standard's share of the market would not warrant a finding of such market control (p. 302). Because the *International Salt case* turned on the use of patents as a tying device, it held that case not to be controlling on the issue before it. It said (p. 307):

> "A patent, moreover, although in fact there may be competing substitutes for the patented article, is at

> least *prima facie* evidence of such control. And so we could not dispose of this case merely by citing *International Salt Co.* v. *United States*, 332 U.S. 392."

Similarly, in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, the Court observed that "Unlike other 'tying' cases where patents or copyrights supplied the requisite market control, any equivalent market 'dominance' in this case must rest on comparative marketing data" (p. 611) and it held that Times-Picayune's 40% share of the New Orleans newspaper advertising market was insufficient. It said (p. 612):

> "If each of the New Orleans publications shared equally in the total volume of linage, the Times-Picayune would have sold 33 1/3%; in the absence of patent or copyright control, the small existing increment in the circumstances here disclosed cannot confer that market 'dominance' which, in conjunction with a 'not insubstantial' volume of trade in the 'tied' product, would result in a Sherman Act offense under the rule of International Salt."

The Court's use of the phrase "market dominance" as the equivalent of the word "monopoly" is evident not only from its rejection of 40% control of the market as insufficient but from its unequivocal statement (p. 611) that "*the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next.*" (Italics ours.)

In the face of these decisions it is difficult to understand how the District Court could have thought that "the tying commodity need only be the particular property or product to which forced purchase of the second commodity is tied"; that "monopoly" and "market dominance" are not inter-

changeable terms, and that "unrestricted fee simple title to land vests in the owner absolute domination of the market in such land." Of course, the ownership of land, like the ownership of anything else, empowers the owner to determine whether or not he will sell or permit another to use his property, and hence enables him to name the terms on which he will sell or lease. But this does not enable him to sell or lease *on his own terms,* because he may be unable to find a purchaser or lessee willing to accept those terms. The "market" implies willing buyers as well as a seller and no one can be said to have "market control" or "dominance" of the market unless he can control *the price and terms which purchasers or users will pay or accept.* Ordinarily such control can exist only where the owner has a monopoly of something which others must have.

Ownership of property in itself confers no coercive power over others. But, if anything is clear from the "tying" cases, it is that *per se* unreasonableness in tying arrangements results from the use of *coercive powers* "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." Nothing in these cases lends support to the idea that it is unreasonable *per se* for an owner of land to attach conditions affecting a substantial amount of commerce to the sale or lease of his land.

In the *Standard Oil Case,* 337 U.S. 293 at p. 312, this Court observed that in Section 3 of the Clayton Act Congress had set up "an express prohibition against a practice thought to be beyond the reach of the Sherman Act" and that it seemed hardly likely that "the necessity of meeting the same tests of detriment to the public interest" as the Sherman Act had been interpreted as requiring were thereby reestablished for Clayton Act cases. And in the *Times-Picayune case,* 345

U.S. 594, at pp. 608-609, as hereinbefore noted, the Court held that while illegality of a tying arrangement under Section 3 of the Clayton Act may be inferred when either monopolistic position in the market for the "tying" product or restraint of a substantial volume of commerce in the "tied" product appears, illegality under the Sherman Act can be inferred only when *both* conditions are met. This distinction between the two acts would be obliterated if the market control resulting from mere ownership of "the particular property or product to which forced purchase of the second commodity is tied" were all that needed to be shown in addition to substantiality of the commerce affected, as supposed by the court below. For obviously all tying arrangements necessarily involve absolute ownership of the "tying" thing.

The need for delimitation of the market

Since the exercise of coercive power resulting from market control of the tying thing is essential to a finding of illegality of a tying arrangement under Section 1 of the Sherman Act, the relevant market alleged to be dominated must be established and the defendant's control of the supply on that market must be ascertained. Thus, in the *Times-Picayune case*, 345 U.S. 594, at p. 610, the Court said, "Once granted that the volume of commerce affected was not 'insignificant or insubstantial,' the Times-Picayune's market position becomes critical to the case." With respect to the market, the Court said (p. 611):

> "The 'market' as most concepts in law or economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any 'appreciable part' of interstate com-

merce, and by §1 unreasonable restraints are banned irrespective of the amount of commerce involved. *Lorain Journal* v. *United States, supra,* at 151, n. 6; *United States* v. *Paramount Pictures, supra,* at 173; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225-226 (1947). But the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight. Cf. *United States* v. *Columbia Steel Co., supra,* at 524.

"We do not think that the Times-Picayune occupied a 'dominant' position in the newspaper advertising market in New Orleans. Unlike other 'tying' cases where patents or copyrights supplied the requisite market control, any equivalent market 'dominance' in this case must rest on comparative marketing data."

In *United States* v. *du Pont & Co.,* 351 U.S. 377, where the du Pont Company was charged with monopolizing interstate commerce in cellophane in violation of Section 2 of the Sherman Act, the Court observed that "if cellophane is the 'market' that du Pont is found to dominate, it may be assumed it does have monopoly power over that 'market'" (p. 391). But it held that cellophane's interchangeability with numerous other materials sufficed to make it a part of the market for flexible packaging materials, and that on the record in the case it could not be said that du Pont had excluded competitors from the flexible packaging material market. In reaching this conclusion the Court said that "monopoly power is the power to control prices or exclude competition" (p. 391); that "illegal power must be appraised in terms of the competitive market for the product" (p. 393), and that "where there are market alternatives that buyers

may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others" (p. 394). The Court's conclusion with respect to the relevant market was thus stated (p. 404):

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."

Since monopoly power must necessarily be the same, whether legally or illegally acquired, the inquiry as to the existence of monopoly power and the delimitation of the relevant market must be the same where the legality of a tying arrangement under Section 1 of the Sherman Act is in issue as where unlawful monopolization in violation of Section 2 is the charge.

Irrelevance of the total amount of appellants' lands

Since the question here is whether appellants' position with respect to their lands will justify an inference that commerce in transportation of products to and from those lands has been unreasonably restrained, the "market" claimed to be dominated must be related to the transportation market from which it is claimed Northern Pacific's competitors have been excluded. Obviously, there may be as many different transportation "markets" as there are different shipping areas in which appellants' lands are located and differing types of commodities shipped by appellants' purchasers and lessees. Shippers using one type of land obviously have no interest in and are not affected by the control exercised

over a different type of land in the same or a different area, or by control of similar lands in another area; and competition for the transportation of commodities from or to a specified shipping point could not in the nature of things be affected by a restraint of competition for the transportation of commodities from or to another shipping point. Thus, control by appellants of the supply of grazing lands in the vicinity of Miles City, Montana, for example, could not by any stretch of the imagination suppress competition for the transportation of lumber or forest products from a point in the State of Washington. Obviously, there is not just one market for appellants' lands any more than there is just one market for Northern Pacific's transportation services.

In consequence, the mere quantity of appellants' lands, in the aggregate, furnishes no justification for the assumption that they possess a monopolistic leverage over any users of interstate transportation. These lands are the remnants of a land grant consisting of alternate odd-numbered sections of land lying in belts fifty to sixty miles wide on either side of the line of railroad, and the particular locations of the remaining lands, or of the lands subject to traffic clauses, is not shown by the record. Nowhere could they constitute a solid block of lands larger than a section, and they are necessarily interspersed with lands in other ownerships. They vary in type and in the uses to which they are adapted or for which they may be valuable, and there is nothing to show that in any area or in any land market appellants' ownership constitutes a majority of available lands of a particular type. In consequence, the strength of the leverage which they may have over users of transportation services at any point or points on Northern Pacific's lines of rail-

road cannot be determined merely by the total number of acres of land they own.

The argument advanced by the Government in the Court below that land is unique in character, that a person acquiring a tract of land to carry on his business selects a particular piece of land and can find no other to suit his purpose or satisy his needs, and that therefore the ownership of a tract of land gives the owner control of the market for his land approaches the ridiculous. In any event, if such a situation exists or has existed in the case of any of appellants' lands, the fact must be established by evidence and cannot be assumed.

Such evidence as there is in the record tends to negative rather than support the conclusion that appellants have a monopolistic or dominant position with respect to lands. As hereinbefore shown (ante, p. 8), neither in Montana, Idaho, nor Washington does their ownership of standing timber amount to as much as 6% of the total, and, in the three states combined, their aggregate ownership is only 4.84% of the total. And the fact that, in 1949, they still owned over a million acres of grazing lands, although for more than fifty years they had been diligently attempting to sell those lands free of any preferential routing provisions, indicates very clearly that the market for such land is and always has been a buyer's market (See deposition of John Hughes, pp. 24-26).

Whether appellants have any market dominance resulting from ownership of lands sufficient to give them coercive power or leverage over users of transportation services is, we submit, a question of fact which cannot be resolved on the record now before the Court.

B. Appellants' traffic clauses neither restrict competition in any transportation market nor operate to the detriment of the public, and they are prima facie reasonable.

The traffic clauses before the Court are, as a rule, expressly conditioned upon Northern Pacific's rates and service being equal to those of any competing line. In grazing leases, timber sale contracts, and contracts relating to the sale of timber lands, the qualifying phrase is simply "rates being equal", or the equivalent. The evidence before the Court, however, is that whether or not the equality of service was expressly mentioned, all of the traffic clauses had been administered by appellants and understood by purchasers and lessees as not requiring use of Northern Pacific's service unless "it was reasonable to expect his business as against his turning it over to a competitive railroad" (deposition of John Hughes, p. 66). Holders of grazing leases testified, in substance, that under the traffic clause contained in their leases they always selected their transportation agency on the basis of their convenience and cost. (See, for example, deposition of Virgil O. McWhorter, p. 56). The phrase, "rates being equal" would certainly seem to imply equality of service, for, unless the services are the same, rates cannot be compared.

In consequence of the provisos to which they are subject, appellants' traffic clauses only control the shipper's choice of transportation agencies where that choice is determined by considerations other than of rates and service, i.e., where it is a matter of indifference to the shipper which agency he will select, and patronage is normally the result of friendship, reciprocity, or like consideration. It is natural,

normal and reasonable for parties dealing with each other to expect reciprocal favors.*

As said by this Court in *Associated Press* v. *United States*, 326 U.S. 1, at page 26, whether a restraint is unreasonable "depends, in essence, on the significance of the restraint in relation to a particular industry." In the railroad industry, railroad rates must be published in filed tariffs on statutory notice, and open to all shippers of the same commodity between the same points, and they must be reasonably related to rates from other points. A rate reduction for the benefit of one shipper necessarily redounds to the benefit of other shippers. In consequence, competition between rival transportation agencies at any shipping point can be little affected by one shipper's agreement to give a particular transportation company a priority on his business when rates and service are equal, for competition for the traffic of other shippers of the same commodity between the same points remains and

*For example, George Williamson of Sand Springs, Montana, testified as follows in his deposition (P. 11):

"Q What in your opinion does that traffic clause mea..?

A. Well, I don't know that it's compulsory.

Q. I don't think that is the answer I want. I want to know what in your opinion is the purpose of that traffic clause and why was it put into your lease?

A. Well, that is just a clause in that that if it's convenient to ship it over their road give them the traffic. I don't know, I would anyway.

Q. Why?

A. They were good enough to lease a man this land and help in anyway they can.

Q. One of the facts is that your sheep grazed on their land without a lease in the early years?

A. That's right.

Q. And you would feel that because of that?

A. Duty bound to ship by them just as a friendly gesture."

insures the benefit of competitive rates and competitive service to all shippers.

Appellants' traffic clauses are thus essentially different from the "lixator" provision which this Court held ineffectual to "avoid the stifling effect" on competition of the tying agreements considered in *International Salt Co.* v. *United States*, 332 U.S. 392, 397. The "lixator" contracts provided that if any competitor offered salt of equal grade at a lower price the lessee should be free to buy on the open market, unless the International Salt Company would furnish the salt at an equal price. The Salt Company thus always had the privilege of determining whether or not it would meet the price of competitors before the lessee was free to buy on the open market, while here railroad rates do not have that flexibility. It cannot be supposed that the traffic clauses here discourage competitors from making rate reductions or offering better service, or both, for regulatory restrictions in the railroad industry limit the freedom of a railroad company to make special adjustments in its rates.

The difficulties encountered by the railroads in meeting the rates and service of truck lines, water lines and pipe lines are matters of common knowledge. The April 1955 Report of the Presidential Advisory Committee on Transport Policy and Organization contains the following on page 1:

> "*Within the short span of one generation this country has witnessed a transportation revolution.*—All elements of the economy have been profoundly affected—investors in transportation property, geographic regions, distribution, individual shippers, the taxpayer, the ultimate consumers of goods and services. As late as 1920, the railroads held a virtual monopoly of intercity transportation with the exception of areas served by water. In striking contrast, there is available today a wide selection of transport methods for the movement of

goods and people from one place to another with economy, expedition, and safety. The individual, whether traveling for recreation or business purposes, has a choice as between the private automobile, intercity bus transportation, air transportation, and railroad travel. The shipper distributing finished products to a nationwide market, is free to elect the use of his own trucks, common or contract carriers by highways, a continental and physically integrated system of common carrier transportation by railroad, pipelines, coastal and intercoastal services, inland water transportation, or the rapidly developing air cargo services."

The 70th Annual Report of the Interstate Commerce Commission, dated November 1, 1956, contains the following comments on pages 1 and 2:

"Public transportation generally is a sound, progressive, and profitable business, but a process of erosion has been taking a gradual and persistent toll for some years. Data which follow show, among other things, that the great expansion of the country's business activity has enabled the railroads to command a larger volume of traffic, but also that their percentage of aggregate intercity ton-miles has declined. They and motor common carriers face increasing competition of exempt and private carriers. The trends involved give rise to concern."

* * * * *

"The transportation charges the public pays could be lower if there were not such diversions of traffic. On the other hand, these carriers are cutting their rates where there seem to be opportunities to meet such outside competition and, in a period in which competition is at its zenith, are cutting rates on a selective basis to divert traffic from one another."

Traffic clauses such as are here in issue have been many times before the courts and have been uniformly upheld

as reasonable and neither in restraint of trade nor otherwise unlawful.

In *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.*, 171 Pa. St. 284, 33 Atl. 239, a covenant obligating a shipper to give a railroad company "all the traffic coming to or going from the property, mines and furnaces owned and controlled, and to be built and operated by them", in consideration of certain financial assistance, was held not in restraint of trade, the Court stating that "its express purpose and necessary effect are to increase both trade and population", and that "not a single traveler or shipper outside the contracting parties is affected in his selection of a route."

In *Interstate Commerce Commission* v. *C. G. W. R. Co.*, 209 U.S. 108, this Court held valid, as against a claim of violation of the Antitrust Act, a contract between the Railroad Company and shippers of packinghouse products, which provided that in consideration of the maintenance of certain rates the packers would deliver to the Railroad a certain percentage of their traffic in packinghouse products. The Court said that common carriers are free "to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits", and that they "may contract with shippers for a single transportation or for successive transportations."

In *United States* v. *Reading Co.*, 253 U.S. 26, this Court considered traffic clauses in two different settings under the Sherman Act. With respect to a covenant in a lease to a railroad company of a line of railroad owned by a coal company requiring the coal company to ship to market over the leased line three-fourths of all the coal which it should produce in the future, the Court held the claim of violation of the antitrust law "too insubstantial to be entertained." With respect to covenants contained in many leases

for the operation of coal producing lands which provided that the lessee should ship all coal mined by rail routes named or to be named, the Court, while not holding them *per se* unlawful, said (p. 55), "Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree of the District Court enjoining the lessors and the other defendants herein from attempting to enforce such covenants will be affirmed."

In *Stephenson* v. *St. Louis Southwestern Ry. Co. of Texas*, 181 S.W. 568, the Court of Civil Appeals of Texas held that a provision in a lease of railroad right of way to a lumber company, that the lumber company would ship over the line of the railway "all freight consigned to the party of the second part at said station which is transported to said point by rail, or may or can be transported to said points over the rails of the railway company" and "all freight it may have at any time to be transported or shipped from said place", subject to a proviso "that the rates over said route are equal to those of its competitors", did not violate the Texas Antitrust Act which prohibited contracts creating restrictions in trade and contracts preventing or lessening competition in the transportation of merchandise, produce or commodities. The Court said:

> "When freight rates are made either by the carriers or the rate-making authorities, the shipper still has the choice of route and carrier, and may, if he desires, select the longest route or the poorest equipped carrier, and base the selection so made upon friendly relations with the carrier or upon any other ground that may appeal to him. By the terms of the contract under discussion no more can be said, it occurs to us, than that the Frost Lumber Company, in consideration of the railway company agreeing to permit the use of its right

> of way for a nominal sum, in turn agreed that, rates being equal, it would give the railway company preference. Agreeing to prefer a particular line of railway in matters of freight does not of itself 'create or carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this state,' when unaccompanied by any act which actually does interfere with the pursuit of such business * * * There being no agreement that the Frost Lumber Company shall ship exclusively over the line of the appellee railway company, but, on the contrary, an express reservation that it may decline to do so, we are unable to see how the agreement can have the effect urged. Conceivably and probably appellee railway company may be unable to meet the rates of competing lines on both outbound and inbound freights."

In *Southwestern Lumber Co.* v. *Kerr*, 11 F. Supp. 253, 266, the Court held that traffic clauses in contracts relating to the sale of timber lands which required shipment of all lumber and other products of mills of the lumber company, regardless of the source of the timber, over a specified line of railroad, did not violate the Texas Antitrust law as that law had been uniformly construed by Texas courts.

See also, *Texas and Pacific Railway Company* v. *Texas Short Line Railway Company*, 80 S.W. 567, and *Saner-Whiteman Lbr. Co.* v. *T. & N. O. R. Co.*, 282 S.W. 267.

Other cases in which traffic clauses have been held valid against objections other than claimed violation of the antitrust laws, are:

United States v. *Northern Pacific Railway Co.*, 18 F. 2d 299, where appellants' leases of portions of its right of way at Spokane, Washington, were held not violative of the Elkins Act, and were conceded by the Government not to be unlawful "merely because of the routing clause" (p. 305).

Cascade Timber Co. v. *Northern Pacific Railway Company*, 28 Wn. 2d 684, where the Court upheld the validity of the traffic clause contained in a contract for sale of certain timber land, and refused to compel the Railway Company to execute and deliver a deed conveying the timber land free and clear of the traffic clause.

Northern Pacific Railway Co. v. *St. Paul and Tacoma Lumber Co.*, 4 F. 2d 359, where the Ninth Circuit Court of Appeals held valid and enforceable a contract by which the Lumber Company agreed to ship over defendant's line at least sixty per cent of the lumber manufactured from timber lands acquired by it from the defendant, as against a contention that the routing clause was in conflict with public policy and void because of its tendency to induce the Railway Company to violate sections 2 and 3 of the Interstate Commerce Act.

In view of the antiquity of the traffic clauses, the many times they have been considered by the Department of Justice and others, and their uniform approval by the courts, their *prima facie* reasonableness, especially where, as here, they leave the purchaser or lessee free to use other transportation agencies where it is to his advantage to do so, can not be gainsaid.

CONCLUSION

Summary judgment was clearly unauthorized in this case. The commerce in transportation alleged to be restrained was not geographically or otherwise defined except as consisting of transportation of "commodities and products shipped from * * * and to persons and concerns occupying both Northern Pacific Railroad owned lands and Northern Pacific controlled lands", which lands were not

themselves identified. The commerce obviously consists of many different and unrelated lines of commerce in transportation. Neither exclusion of competitors from any of these transportation markets nor stifling effects of the traffic clauses on competition therein could fairly be inferred from the face of the clauses or from the manner in which they had been understood and administered, in view of the freedom they allow purchasers and lessees to use the services of competing forms of transportation when to their advantage to do so. And neither appellants' ownership of lands nor the aggregate amount of lands owned could *ipso facto* confer control of any market for land or vest in appellants such coercive power over users of land in any market as to warrant the inference that competition in transportation at any shipping point had been or probably would be restricted by the use of these clauses.

Material issues of fact, either as to appellants' alleged use of monopolistic powers to gain an unfair advantage over competitors or as to the alleged suppression of competition or other harmful economic effects of the clauses, accordingly remained for trial. We respectfully submit that the judgment should be reversed and the case remanded to the District Court for trial.

Respectfully submitted,

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